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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

DANIEL T. PAUER, PETITIONER

-vs-

STATE OF OHIO

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF OHIO,
ELEVENTH DISTRICT

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Chardon, Ohio 44024
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QUESTIONS PRESENTED FOR REVIEW

A. Was Defendant-Appellant denied a fair trial from the State of Ohio, by an impartial jury, as guaranteed by the Sixth Amendment of the Constitution of the United States, when it is established that the Jury Foreman was guilty of bias, misconduct, and misrepresentations to the Trial Court and trial counsel at jury voir dire, and to the other jurors during deliberations?

B. Is Ohio Revised Code Section 2925.03 (A)(3) (Cultivation of Marijuana) repugnant to the United States Constitution on the basis of vagueness, ambiguity, and violation of due process, when it does not specify cultivation of marijuana itself as a prohibited activity, and does not specify any maximum amount; yet, in a following subsection, permits cultivation for personal use as an affirmative defense with the burden of showing same placed upon

the accused by a preponderance of the evidence (Ohio Revised Code section 2925.03(F); at the same time, Ohio Revised Code Section 2925.11(C)(3) prohibits possession or use of marijuana (but if such possession or use is less than 100 grams it does not constitute a criminal record).

C. Did the trial court incorrectly rely on Franks v. Delaware, 438 U.S. 154 (1978), in denying Defendant-Appellant an evidentiary hearing for his Motion to Suppress the Search Warrant as invalid, and quashing the subpeonas of his witnesses for this evidentiary hearing, on the basis of a lack of substantial preliminary showing, when trial counsel for Defendant-Appellant had stated to the Court at the scheduled hearing the specifics of the search warrant affidavit that were false or misleading, and had the witnesses there ready to verify these falsifications and misrepresentations?

D. Is the issuance of a search warrant upon probable cause which at most establishes a non-criminal minor misdemeanor offense, therefore, an "unreasonable" search and seizure under the Fourth Amendment of the United States Constitution? McDonald v. U.S., 335 U.S. 451, 460 (1948, Justice Jackson concurring).

E. Was Defendant-Appellant denied due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution when the trial court permitted the jury to decide if Defendant-Appellant was guilty of cultivation of marijuana, instead of mere possession or use, when the State's evidence had only shown that Defendant-Appellant had used marijuana, while his Wife actually grew it?

F. Was the placing upon Defendant-Appellant by Ohio Revised Code section 2925.03(F), the burden of going forward with evidence of possession/use of marijuana

solely for personal use, and with burden of proof, by preponderance of evidence, possession or cultivation solely for personal use, violation of the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, that prosecution prove beyond a reasonable doubt the absence of solely personal use when that issue has been properly presented? Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 955 S.Ct. 1881 (1975).

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JURISDICTIONAL GROUNDS

This is an appeal from the State of Ohio of the conviction of Defendant-Appellant on September 24, 1979, under Ohio Revised Code section 2925.03(A)(3), Trafficking/ Cultivating Marijuana. This conviction was affirmed by the Eleventh District Court of Appeals of Ohio on April 1, 1982. On September 15, 1982, Motion for Leave to Appeal to the Supreme Court of Ohio was overruled, and the Appeal as a Matter of Right was dismissed.

It is from the Supreme Court of Ohio entries that Defendant-Appellant now seeks review and certiorari.

The United States Supreme Court has jurisdiction to hear this matter under 28 U.S.C. Section 1257(2) and (3); 28 U.S.C. Section 2104; and United States Supreme Court Rule 17.

CONSTITUTIONAL PROVISIONS AND STATUTES THIS CASE INVOLVES

A. Sixth Amendment, United States Constitution:

> In all criminal prosecutions, the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. (Emphasis Added)

B. Ohio Revised Code Section 2925.03(A)(3): (full text set forth in Appendix)

> No person shall knowingly do any of the following:
>
> Cultivate, manufacture, or otherwise engage in any part of the production of a controlled substance;

C. Ohio Revised Code Section 2925.03(F):

> It shall be an affirmative defense, as provided in section 2901.05 of the Revised Code, to a charge under this section for processing a bulk amount of a controlled substance or for cultivating marijuana that the substance which gave rise to the charge is in such amount, in such form, or is prepared, compounded, or

mixed with substances which are not controlled substances in such a manner, or is possessed or cultivated in any other circumstances whatsoever as to indicate that the substance was solely for personal use.

D. Ohio Revised Code Section 2925.11(C)(3): (full text set forth in Appendix)

(A) No person shall knowingly obtain, possess, or use a controlled substance.
(C) Whoever violates this section is guilty of drug abuse.
(3) If the drug involved is marijuana, drug abuse is a misdemeanor of the fourth degree, unless the amount of marijuana involved is less than one hundred grams, the amount of marijuana resin or extraction or preparation of such resin, is less than five grams, and the amount of such resin in a liquid concentrate, liquid extract, or liquid distillate form, is less than one gram, in which case drug abuse is a minor misdemeanor.
(D) Arrest or conviction for a minor misdemeanor violation of this section does not constitute a criminal record and need not be reported by the person so arrested or convicted in response to any inquiries about the person's criminal record, including any inquiries contained in any application for employment, license, or other right or privilege, or made in connection with the person's appearance as a witness,

E. Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

F. Fourth Amendment, United States Constitution.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

G. Fourteenth Amendment, United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law

which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

In March, 1979, Defendant-Appellant's eleven-year old daughter brought a marijuana leaf to school, gave it to her teacher, and told her that her Mother grew marijuana at their home, and that her parents smoked or used it.

The Geauga County Welfare Department child services department and the Chester Township Police were notified. A field test was conducted on the leaf, which indicated it was marijuana. Based on this information a daytime Search Warrant of Defendant-Appellant's residence in Chester Township, Geauga County, Ohio, was obtained (Appendix A-4) from the Chardon Municipal Court, for allegedly violating Ohio Revised Code Section 2925.03(A)(3) (Cultivating Marijuana).

When the search was conducted, Defendant-Appellant's Wife was at home. Defendant-Appellant came home during the search and then left before it was completed. The search revealed marijuana seedling plants growing in pots in the bedroom of the Defendant-Appellant and his Wife; there were also seedling plants growing on shelves with concrete block supports in the basement of the home of Defendant-Appellant and his Wife. These seedling plants were seized by the State. No statements were made by Defendant-Appellant or his Wife.

Defendant-Appellant and his Wife were then indicted for violating O.R.C. Section 2925.03(A)(3) (Drug Trafficking/Cultivating), a Fourth Degree Felony in Ohio punishable from six months to five years in a State Penal institution, and/or a maximum fine of Two Thousand Five Hundred Dollars ($2,500.00).

Defendant-Appellant filed a Motion to Dismiss the charge against him on the basis that it was unconstitutionally vague, ambiguous, and a violation of due process under state and federal law. This Motion was denied, assigned as error on appeal, but affirmed. (Appendix A-6).

Defendant-Appellant also filed a Motion to Supress the Search Warrant on the basis that there were false, misleading, and reckless statements in the Affidavit signed by the police officer. (Appendix A-4). The Trial Court denied this Motion and also denied Defendant-Appellant the opportunity to put on witnesses from the Welfare and Police Department in support of his contentions on the basis that Defendant-Appellant had not made a substantial preliminary showing of an improper Affidavit, citing Franks v. Delaware, 438 U.S. 154 (1978). (Appendix A-5). This ruling was raised on appeal by assignment of error but affirmed (Appendix A-6).

Defendant-Appellant also raised the issue on his Motion to Suppress that the issuance of a formal, criminal search warrant was unreasonable under the circumstances since the probable cause had at most established a non-criminal minor misdemeanor offense under O.R.C. 2925.11(C)(3) and (D). (Appendix A-3). Once again, the Trial Court overruled this argument (Appendix A-5), assigned an error on appeal, and affirmed. (Appendix A-6).

In September, 1979, Defendant-Appellant and his Wife were tried separately to jurors, with Defendant-Appellant's case going forward first. At trial, the State introduced the statement of Defendant-Appellant's eleven-year old daughter stating that her Mother grew marijuana and that her parents used it (Appendix A-4); the State also had an expert witness identify the seedlings as marijuana and how the seedlings under proper conditions could grow to several

feet in height, with broad leaves, yielding certain amounts of marijuana, etc. The actual amount of marijuana in these seedlings was far less than 100 grams. The State's case also established that some of the seedling plants in the bedroom of Defendant-Appellant and his Wife, were under a transit with Defendant-Appellant's hat on it, that tnere was an artificial light attached to the transit; that the seedling plants in the basement were on shelves supported by concrete blocks, and that Defendant-Appellant was a mason by trade. Defendant-Appellant did not take the stand.

Defendant-Appellant moved for an acquittal at the close of the State's case on the basis that all that the State's evidence had shown was that his Wife cultivated the marijuana, that his Wife and Defendant-Appellant smoked it, and that at most, Defendant-Appellant himself was only in violation of O.R.C. 2925.11(C) and (D), possession or use of marijuana, a minor misdemeanor,

non-criminal offense. No evidence was introduced that Defendant-Appellant had used the marijuana other than for his own personal use. The Trial Court denied this Motion, this was assigned as error on appeal, and it was affirmed.

The Trial Court then instructed the jury, including the affirmative defense instruction of possession/cultivation for personal use, which instruction required the Defendant-Appellant to prove this defense by a preponderance of the evidence. Objection was made by Defendant-Appellant, overruled by the Trial Court, assigned as error on appeal, but affirmed. (Appendix A-6). Defendant-Appellant was convicted of the Fourth Degree Felony of Cultivating, O.R.C. 2925.03(A)(3). (Appendix A-2).

A few days later Defendant-Appellant's Wife was tried to a jury before the same Trial Judge, took the stand, corroborated her daughter's statement that she alone was growing the marijuana seedlings, that she and her husband, Defendant-Appellant used

it for their own personal use: she was convicted of the minor misdemeanor, non-criminal offense of possession/use of marijuana less than 100 grams and was fined $100.00. (Appendix A-8).

Within a very short time of Defendant-Appellant's Wife's trial, Defendant-Appellant bumped into one of the jurors for his trial at a local drugstore. This juror asked Defendant-Appellant if he knew the Jury Foreman, one Kolsom, whom Defendant-Appellant did not know. Defendant-Appellant then learned from this juror that during deliberations, this Jury Foreman claimed to know Defendant-Appellant, claimed to know that Defendant-Appellant made his living from selling drugs, and other such non-evidentiary, prejudicial statements. Defendant-Appellant's trial counsel looked into this matter further, and also found out that the Jury Foreman had a tire business in Chester Township (Defendant-

Appellant's township) selling tires to the Township and Police Department (which department had brought the charges against Defendant-Appellant). On his jury questionnaire and at voir dire the Foreman had indicated he was retired from a job in Cleveland.

Defendant-Appellant then filed a Motion For A New Trial on the basis of juror misconduct in violation of his State and Federal right to an impartial jury. At this hearing, Defendant-Appellant produced another juror beside the one he had met at the drugstore. Both indicated how the Foreman's non-evidentiary remarks bothered their consciences and that he had influenced them against Defendant-Appellant (Appendix A-9). The misrepresentations of the Foreman concerning his employment was also established at this hearing. The Court also took the testimony of the Foreman where it was further established that he had been the victim of a crime which was not admitted

by him at voir dire, though asked.

Despite all this evidence of misconduct, bias, and misrepresentations by the Jury Foreman to the Court and Trial Counsel, and despite the Trial Court finding that this Foreman had " ... probably misled both counsel ...," that he had made statements to his fellow jurors to the effect that Defendant-Appellant made his living by growing marijuana, and that the Court did not condone his conduct, the Trial Court found that Defendant-Appellant received a fair trial and overruled the Motion for a new trial! (Appendix A-10).

On January 8, 1980, the Trial Court sentenced Defendant-Appellant to the Ohio Correctional Medical and Reception Center at Columbus, Ohio, for a period of not less than two nor more than five years, and fined him $500.00. The jail sentence was suspended and Defendant-Appellant placed on probation for a period of two years. It is

from this felony conviction that Defendant-Appellant appeals.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

A. Jury Misconduct/Denial of Impartial Jury: Defendant-Appellant is now a convicted felon under Ohio Law as a result of his State and Federal right to an impartial jury having been violated by a biased juror guilty of misconduct. This desecration of our jury system has been tolerated by the Ohio Eleventh District Court of Appeals affirmance of Defendant-Appellant's conviction, and by the Ohio Supreme Court's refusal to grant certiorari.

In U.S. v. Howard, 506 F.2d 865 (1975) the United States Fifth Circuit Court of Appeals vacated the district Court's order denying Defendant's Motion for a New Trial where a juror's Affidavit, indicating the extrinsic fact that the accused had been in trouble previously, had been introduced by a juror into the jury room though no such

evidence had been admitted during trial.

This Federal Appellate Court stated regarding jury deliberations and conduct:

> "... We cannot tolerate prejudicial factual intrusion into that sanctum lest our courts return to the darker days of our jurisprudence history. The dagger of hidden evidence must not be taken from its scabbard for the first time in the jury room to wound the defendant; ... we must apply a constitutional salve ... This danger to fair trials is most acute when facts which have not been tested by the trial process have been intentionally communicated directly to the jurors ... (at 866) While the 13th century jury may have been selected precisely because of its ready familiarity with background facts, this no longer fits our conception of the jury's role ... (at 867) ... prejudice will be assumed in the form of a rebuttable presumption, and the burden is on the government to demonstrate the harmlessness of any breach to the defendant ..." (at 869). (Emphasis Added)

See also 58 ALR 2d 556, Admissibility and Effect in Criminal Case, of evidence as to Juror's Statements, during deliberations as to facts not introduced into evidence:

> "Most of the Courts which have received jurors' affidavits or testimony as to improper statements made by other jurors in the course

> of deliberations have taken the view that where the statements in question related to a matter not in evidence, and having a tendency to reflect upon the accused's claim of innocence or the degree of his guilt, it would be presumed that it did in fact have an improper effect upon the jury's deliberations and was prejudicial to the accused ... (at 568) ... little or no weight would be given to jurors' testimony that they were not influenced by improper statements made in the jury room (at 573-4) ... A juror's remarks to his fellows, in the course of the jury's deliberations, that defendant was of a bad character or had a bad reputation have frequently been regarded as so prejudicial as to require a new trial ... (at 577). (Emphasis Added)

B. Unconstitutionality of O.R.C. Section 2925.03(A)(3): The vague, ambiguous wording of O.R.C. Section 2925.03(A)(3), Cultivation, coupled with the affirmative defense Section O.R.C. 2925.03(F) and Section O.R.C. 2925.11(C) and (D), has permitted Defendant-Appellant to be convicted of a felony, while his Wife, who was charged under the same section, and who the evidence actually showed was growing the marijuana, was convicted of a minor misdemeanor, non-

criminal offense! The allowance of such vagaries and ambiguities which can and did result in such extreme outcomes to Defendant-Appellant and his Wife are repugnant to the Constitution as a violation of loss of liberty without due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

C. Due Process Denial of Evidentiary Suppression Hearing: The denial by the Trial Court to Defendant-Appellant of an evidentiary hearing challenging the validity of the search warrant was an abuse of discretion in violation of Defendant-Appellant's right to due process as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution. Defendant-Appellant had filed a Motion to Suppress the property seized under the warrant on the basis of false statements by the Affiant, attached a memorandum in support of the Motion, and subpoenaed witnesses for the

suppression hearing. At this hearing the Trial Court quashed the witness subpoenas and refused to permit them to testify. The Court incorrectly relied on Franks v. Delaware, 438 U.S. 154, 57 L.Ed. 2d 667 in denying this hearing.

It is true that Defendant-Appellant did not attach Affidavits to his Motion to his Motion to Suppress specifying the invalidity and falsifications in the Search Warrant Affidavit, however, he had filed a supporting Memorandum with his Motion, and subpoenaed the witnesses to the Suppression Hearing to demonstrate that the police officer procuring the warrant and signing the warrant-affidavit, had not personally talked to Defendant-Appellant's minor daughter regarding the marijuana as alleged in the search warrant affidavit. Defendant-Appellant's trial counsel stated this to the Court at the start of the Suppression Hearing and had the witnesses there,

ready to establish that and other points that were not correct in the search warrant affidavit, but the Court, incorrectly relying on Franks, supra, quashed the subpoenas and denied an evidentiary hearing, citing the portion of Franks requiring affidavits with the Motion. It should also be noted that this Court found in favor of the accused in Franks, and upheld his right to an evidentiary hearing on a Motion to Suppress.

D. Unreasonableness of Issuance of Search Warrant for Non-Criminal Misdemeanor: The Fourth Amendment of our United States Constitution protects us from "unreasonable" searches and seizures. In the instant case, the State utilized the time, expense, and seriousness of the warrant process for what the probable cause had established was at most a minor misdemeanor, non-criminal offense under Ohio Law.

As Justice Jackson, concurring in McDonald

v. U.S., 335 U.S. 451 at 460 (1948) stated, concerning the enforcement against the numbers racket (malum prohibition) versus malum in se:

> "This method of law enforcement displays a shocking lack of all sense of proportion."

See also, Nuslein v. District of Columbia, 115 F. 2d 690, 696 (1940).

E. Conviction a Due Process Violation When Evidence/Proof Patently Insufficient: It was a violation of Defendant-Appellant's right to due process of law guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution, to be convicted beyond a reasonable doubt of Trafficking/ Cultivating marijuana, when the evidence had shown Defendant-Appellant's Wife actually grew the marijuana, Defendant-Appellant only smoked it, Defendant-Appellant and his Wife occupied the bedroom and basement where the marijuana seedling plants were grown, Defendant-Appellant's transit

and hat were above the bedroom seedlings, the basement seedlings were on shelves with concrete block supports, and Defendant-Appellant was a mason.

In order to prove beyond a reasonable doubt the element of "cultivation" the State had to show that Defendant-Appellant had " ... planted, watered, fertilized, or tilled the plants." (Ohio Revised Code Section 2925.01(G), Appendix A-11). No such evidence was presented.

See Delgado v. U.S., 327 F. 2d 641 (1964) where the Court reversed the Defendant's and spouse's conviction regading marijuana, on the basis of insufficient evidence to sustain an element of the offense, namely possession, when the marijuana was found in the bedroom of the Defendant and his Wife. The Court further held that the guilt must be individual.

F. Due Process Violation When Defendant-Appellant Required to Prove Element of

Defense by Preponderance of Evidence When That Element is Properly Raised in State's Case In Chief: The placing upon Defendant-Appellant the burden of going forward with evidence of solely personal use and with burden of proof, by preponderance of evidence, of possession/cultivation of marijuana solely for personal use, was a violation of the due process clauses of the Fifth and Fourteenth Amendments that prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged. To satisfy due process, prosecution must prove beyond reasonable doubt the absence of solely personal use when that issue is properly presented. Mullaney v. Wilbur, 421 U.S. 684, 44 L.Ed. 2d 508, 955 S.Ct. 1881 (1975); Krzeminski v. Perini, 614 F 2d 121, 16 Ohio Ops 3d 306, (1980: 6th Cir C.A.).

In Mullaney and the instant case, the central issue revolved around the criminal

element of intent, which intent would significantly determine the criminal result and sanctions. In Mullaney, the difference of intent meant a difference between a nominal fine to life imprisonment; in the instant case, the difference of intent for only personal use or possession meant the difference between a nominal fine not constituting a criminal record (O.R.C. 2925.11(C)(3)), to being a convicted felon, subject to five years imprisonment in a State Penitentiary. In Mullaney, the Supreme Court rejected the State's contention that the burden of proving the absence of intent was unduly, especially:

> " ... when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result ..." at 521, 522 (Emphasis Added)

Under O.R.C. Section 2925.03(A)(3) all the State has to show is that a defendant cultivated marijuana. It does not matter how much or for what purpose. It is then

up to the Defendant to prove himself guilty of a misdemeanor by a preponderance of the evidence of cultivation/possession/use solely for personal use in order to avoid a felony conviction! As was true in the Mullaney case quoted above, such result (and procedure in criminal law) is intolerable!

COPIES OF OPINIONS AND ORDERS

See Appendix for designation and labeling.

CONCLUSION

For the reasons set forth above, Petitioner prays that this Court grant certiorari to his Petition in order to correct the violation and denial of his federal rights to an impartial jury, clear, unambiguous constitutional statutes, and due process.

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PROOF OF SERVICE

As required by Rule 28.5 of this Court, I hereby certify that all parties required to be served have been served and that three copies of the foregoing Writ for Certiorari were hand-delivered to the office of the Geauga County Prosecutor CRAIG ALBERT, at Courthouse Annex, Chardon, Ohio, 44024 on this _____ day of November, 1982.

EDWARD T. BRICE
Attorney for Petitioner

APPENDIX

A-1 Supreme Court Entries Denying Certiorari

A-2 O.R.C. Section 2925.03

A-3 O.R.C. Section 2925.11

A-4 Statement attached to Search Warrant

A-5 Order Denying Motion to Suppress, etc.

A-6 Court of Appeals Judgment Entry , Opinion

A-7 Judgment Entry Conviction Entry.

A-8 Jean Pauer's Judgment Entry

A-9 Jury Misconduct Transcript excerpt.

A-10 Judgment Entry Denying New Trial.

A-11 O.R.C. Section 2925.01